

swers to them: *Ah Phut v. King*⁽⁴⁾; *Jalwanti Lodhin v. State*⁽⁵⁾.

Although it is not essential for the Trial Court to make a record of such satisfaction (*Krishna Kahar v. Emperor*⁽⁶⁾), it is desirable for it to do so as this would assist the Appellate Court. Had this procedure been followed and the learned President found as a result that P.W. 3 was incompetent, then she would have been rejected as a witness.

If, on the other hand, the witness was found to be competent to testify, then, the second question to be determined was whether she should be affirmed or just warned to speak the truth. This was necessary since, on the learned President's own finding, she was "mentally retarded" and thus a person of "immature age" within section 8 of the Oaths and Affirmations Act, 1949: see *Ng Kwee Piow v. Regina*⁽⁷⁾. To determine this question the learned President would have had to be satisfied that the witness had a sufficient appreciation of the seriousness of the occasion and a realization that taking the oath involves something more than the duty to tell the truth in ordinary day-to-day life: *R. v. Hayes*⁽⁸⁾; *R. v. Campbell*⁽⁹⁾. If not so satisfied, then, the learned President should not have allowed the witness to give evidence on oath or affirmation but should, in the words of section 8 of the Oaths and Affirmations Act, 1949, have cautioned her to speak the truth, the whole truth and nothing but the truth. Furthermore, appropriate questions may also be necessary to ascertain whether the child "understands the duty of speaking the truth or not" and the Supreme Court of India has held that it is desirable that judges should record their opinions and reasons for so thinking, otherwise it may be necessary to reject the evidence altogether: *Rameshwar v. State of Rajasthan*⁽¹⁰⁾. It follows, therefore, that the learned President should have granted the defence applications to have P.W. 3 examined by a psychiatrist or medical officer from Hospital Bahagia. Similarly, I consider the reasons advanced by the defence for the recall of P.W. 3 for further cross-examination were sufficient to justify the making of an order for recall under section 118(4) of the Evidence Act.

The refusals aforesaid prevented the Appellant from exercising a statutory right and its effect might well have been to sever a vital artery of evidence thus offending the elementary ideas of the adversarial system of justice to which our

A courts subscribe. Illustrations of the application of this principle are to be found in the cases of *Public Prosecutor v. Yap Kok Meng*⁽¹¹⁾ and *Paramasivam v. Public Prosecutor*⁽¹²⁾.

B I must, in the circumstances, echo the classic and oft-quoted words of Lord Hewart in *Rex v. Sussex Justices*⁽¹³⁾ that "it is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done."

C In the result, as none of the steps adumbrated above was observed by the learned President, I must also, though with some regret, quash the conviction and set aside the sentence.

D That, however, is not the end of the matter. Although the charge relates to an offence alleged to have been committed a little more than four years ago, and the appellant had been in custody for three months and four days before he was admitted to bail, I have allowed this appeal because of misdirection by the learned President in refusing the defence applications aforesaid. What would have resulted had the defence applications been granted, as they undoubtedly should have, is a matter for speculation and can only be resolved at a re-trial before another President, which I hereby order. The Appellant is admitted to bail pending his re-trial on the same terms as in the Court below and will attend the Sessions Court, Ipoh, on Monday, December 19, 1983 at 9.00 a.m., when his case will be mentioned.

*Appeal allowed;
Re-trial ordered.*

Solicitors: *Bachan & Kartar.*

H PUBLIC PROSECUTOR v. LIM YOO HOCK

[A.Cr. J. (Edgar Joseph Jr. J.) February 22, 1984]
[Ipoh — Perak Criminal Appeal No. 214 of 1983]

I *Criminal Law and Procedure — Charge — Defective charge — Qualified plea of guilty — Films (Censorship) Act, 1952, s. 15 — Revision — Criminal Procedure Code, s. 305.*

In this case the respondent had been convicted on a charge alleging that he was found in possession of videotapes. The respondent was fined \$2,000 or in default 4 months' imprisonment. The Public Prosecutor appealed against the sentence.

Held: (1) the charge was defective as possession of the offending tapes *per se* did not constitute an offence within the meaning of section 15(1) of the Films (Censorship) Act, 1952;

(2) when the respondent said in mitigation that the tapes were not meant for hire the respondent was in fact making a qualified plea which ought to have led the Magistrate to reject the plea of guilty and enter instead a plea of "Not guilty";

(3) the conviction should therefore be quashed and a retrial be ordered.

Cases referred to:

- (1) *Lee Yu Fah v. Public Prosecutor* [1937] M.L.J. 179
- (2) *R. v. Lim Soh Chwee* Braddell's Common Gaming Houses 178
- (3) *Municipal Commissioners v. Chuah Seng & Ors.* 3 Ky. 140
- (4) *Deya Singh v. DeCruz* 1 S.S.L.R. 147.
- (5) *Khor Swee Khim v. Public Prosecutor* [1953] M.L.J. 117.
- (6) *Public Prosecutor v. Leong Yoon Meow* [1953] M.L.J. xxxv.
- (7) *Public Prosecutor v. Syed Bakri* [1955] M.L.J. xvii.

CRIMINAL APPEAL.

Jalaldin bin Hussin. (Deputy Public Prosecutor) for the appellant.

V.W. Balasingam for the respondent.

Cur. Adv. Vult.

Edgar Joseph Jr. J.: This was a sentence appeal by the Public Prosecutor.

The Respondent was prosecuted in the Magistrate's Court at Lumut on the following charge:

"That you on 27th day of April, 1983, at about 10.45 a.m. at Shop No. 203, Sungai Pinang Kecil, Pangkor, in the District of Manjung, in the State of Perak, were found in possession of films, to wit, 1095 Video-tapes (as annexure attached), which had not been marked under the Provision of Section 9(2) or 9A(2) of the Films (Censorship) Act 1952, and that you have thereby committed an offence punishable under section 15(1) of the Films (Censorship) Act 1952 (Revised 1971)".

He pleaded guilty thereto, and was sentenced to pay a fine of \$2,000/—, in default, to four months' imprisonment.

When the matter came up before me, counsel for the Respondent sought an adjournment, which I was not prepared to grant. I did, however, stand the case down for a short while, and, when hearing resumed, I took two points upon which I invited

A arguments. They were, firstly, whether the charge upon which the Respondent had been convicted disclosed an offence known to the Law; secondly, whether the plea in mitigation made by the Respondent in person rendered his plea a qualified plea so that the Court ought to have rejected it and entered a plea of "Not Guilty."

The learned Deputy conceded, in my opinion rightly, that both questions should be answered in favour of the Respondent.

C Section 12 sub-section (1) of the Films (Censorship) Act, 1952 ("the Act") as amended vide Act A 490/1980) reads as follows:

"Any person who exhibits, sells, hires or distributes or causes to be exhibited, sold, hired or distributed any film—

- (a) in respect of which a certificate has not been issued under section 9(2) or 9A(2);
- (b) in respect of which the certificate issued under section 9(2) or 9A(2) has ceased to be valid under section 13 or 14;
- (c) which, since the certificate was issued in respect thereof, has been altered or tampered with in any way; or
- (d) in breach of a condition imposed under section 25(2), shall be guilty of an offence and shall, on conviction, be liable to a fine not exceeding ten thousand ringgit."

Clearly, therefore, possession of the offending video tapes *per se* did not constitute an offence within the meaning of the sub-section.

G By the same token, when the Respondent said in mitigation that the tapes were not meant for hire, as they were put in the cabinet lockers, the Respondent was in fact making a qualified plea which ought to have led the Magistrate to reject the plea of guilty and enter instead a plea of "Not Guilty."

H It is well settled law that even when an accused person is convicted by a Magistrate on his own plea of guilty and is precluded from appealing under section 305 of the Criminal Procedure Code, the Appellate Court can always in a proper case exercise its powers of revision: *Lee Yu Fah v. Public Prosecutor*⁽¹⁾. Moreover, a plea of guilty to an offence unknown to the law is no plea at all: *R. v. Lim Soh Chwee*⁽²⁾. In this context, the cases of *Municipal Commissioners v. Chuah Seng & Ors.*⁽³⁾,

Deya Singh v. de Cruz⁽⁴⁾ and *Khor Swee Khim v. Public Prosecutor*⁽⁵⁾, also merit reading.

In these circumstances, acting in revision, I quashed the conviction and directed a retrial on a proper charge in contravention of section 15 subsection (1) of the Act. I also ordered that the fine, if paid, was to be refunded to the Respondent and the exhibits, to be returned to the police for necessary action.

The Public Prosecutor's appeal was, in consequence, dismissed.

Before departing I would respectfully remind the prosecution that it is essential when proceeding *de novo* to use the language of the relevant section under which the accused is charged and of the salutary advice of Thomson, J. (as he then was) in *Public Prosecutor v. Leong Yoon Meow*⁽⁶⁾ that it is a very good working rule to hold that where what an accused is alleged to have done cannot be described in the language of any statutory provision creating the offence or where it seems necessary to depart from the language of the section in framing charges, then, the probability is that no offence has been committed. To the same effect is the case of *Public Prosecutor v. Syed Bakri*⁽⁷⁾.

Conviction quashed; Re-trial Ordered.

Solicitors: *Cheong Lee & Ong.*

MALEB BIN SU v. PUBLIC PROSECUTOR CHEAK YOKE THONG v. PUBLIC PROSECUTOR

[A.Cr. J. (Hashim Yeop A. Sani F.J.) March 8, 1984]
[Seremban – Criminal Appeal Nos. 2 & 8 of 1984]

Administrative Law – Attorney-General, whether head of service with supervision and control over judicial officers – Whether President or Magistrate should disqualify himself from proceeding with case on ground that he belonged to a service headed by Attorney-General – Whether there was likelihood of bias – Test applied by court

Criminal Law & Procedure – Appeal – Right to appeal – Order must be final order – Dismissal of application to disqualify not proper matter for appeal – Criminal Procedure Code (F.M.S. Cap. 6), s. 307(i).

Legal Profession – Attorney-General – Whether Attorney-General head of the judicial department – Federal Constitution, arts. 132(1) & 138.

These were appeals against the dismissal by a President and a Magistrate of applications made by respective counsel at the commencement of hearing. The application was that the President or Magistrate should disqualify himself from proceeding with the case on the grounds that he belonged to a service in which the Attorney-General is said to be the head of the service. Since the Attorney-General is also the Public Prosecutor and has supervision and control of these judicial officers it was alleged that there was a likelihood of bias.

Held: (1) in the present appeals, the dismissal of the application to disqualify did not finally dispose of the rights of the accused person and the order was not a proper matter for appeal under section 307(i) of the Criminal Procedure Code;

(2) if bias is alleged (other than pecuniary or proprietary bias) then there must be proved a *real likelihood* of bias and that reasonable suspicion of bias is insufficient. Thus, bare allegations (as done in the present case) are insufficient. *A fortiori* bare allegations before hearing had hardly commenced;

(3) there is nothing in law to say that the Attorney-General is the head of the service. In fact he cannot be by virtue of Article 138 of the Constitution. Thus looking at the legal and administrative framework governing the service, the facts here did not warrant a conclusion of a real likelihood of bias;

(4) based on the foregoing, the orders made in the lower courts in Criminal Appeal Nos. 2 and 8 of 1984 should not be interfered with.

Cases referred to:

- (1) *Mohammad Amin Bros v. The Dominion of India* A.I.R. 937 1950 F.C. 77.
- (2) *Public Prosecutor v. Hoo Chang Chwen* [1962] M.L.J. 284.
- (3) *Public Prosecutor v. R.K. Menon & Anor.* [1978] 2 M.L.J. 152.
- (4) *R. v. Huggins & Anor.* [1895] 1 Q.B. 563.
- (5) *R. v. Altrincham Justices* [1975] 2 W.L.R. 450.
- (6) *In re S (A Barrister)* [1981] 1 Q.B. 688.
- (7) *Leeson v. General Council of Medical Education and Registration* (1889) 43 Ch.D.366, 384-385.
- (8) *Healey v. Rauhin & Anor.* [1958] N.Z.L.R. 945.
- (9) *R. v. Camborne Justices, Ex parte Pearce* [1955] 1 Q.B.41.

H CRIMINAL APPEALS.

James Ponniah, Abu Hashim bin Haji Abu Bakar, Yusof Khan bin Ghows Khan, and Seeralan Suppiah for the applicants.

Lim Beng Choon and Phang Ah Hee (Dy. Public Prosecutors) for the Public Prosecutor.

Cur. Adv. Vult.

Hashim Yeop A Sani F.J.: These are appeals against the dismissal by a President and a Magistrate of application made by respective counsel at the commencement of hearing. The application was that the President or Magistrate should dis-